



MODIFYING PRIMARY RESIDENTIAL RESPONSIBILITY

A Research Guide for a North Dakota Civil Court Process

The North Dakota Legal Self Help Center provides resources to people who represent themselves in civil matters in the North Dakota courts.

The information provided in this research guide is intended as a starting point for your research into modifying primary residential responsibility in an order of a North Dakota district court.

The information provided in this research guide is not intended for legal advice and cannot replace the advice of competent legal counsel licensed in the state.

The self-represented individual must make all decisions about how to proceed.

References to non-ND Legal Self Help Center resources are included for your convenience only. Including these references does not mean the ND Legal Self Help Center endorses, warrants, or accepts responsibility for the content or uses of the resource. Use at your own risk.

(Primary residential responsibility means a parent with more than 50% of the residential responsibility. Please note that in 2009 the North Dakota State Legislature changed the term “custody” to “residential responsibility” and changed the term “visitation” to “parenting time.”)

OVERVIEW OF MODIFYING PRIMARY RESIDENTIAL RESPONSIBILITY:

When a North Dakota district court awarded residential responsibility in a family law case, such as divorce, legal separation, or other action to establish parenting rights and responsibilities, either parent may ask the court to modify primary residential responsibility in the existing case, if certain requirements are met.

Time limitations when a final order establishing primary residential responsibility has not been modified:

The parent requesting modification has the burden of proving requirements are met for modifying primary residential responsibility.

In general, neither parent may request changes to primary residential responsibility until two (2) years after the date of entry of the final order establishing primary residential responsibility.

Exceptions to the two (2) year time limit are:

1. The parents agree in writing to modifications to primary residential responsibility;
2. Modifications to primary residential responsibility are included in the parenting plan; or
3. The court finds one (or more) of the following:

- The persistent and willful denial or interference with parenting time;
- The child's present environment may endanger the child's physical or emotional health or impair the child's emotional development; or
- The primary residential responsibility for the child has changed to the other parent for longer than six months.

The parent requesting modification to primary residential responsibility after the two (2) year time limitations must prove:

1. On the basis of facts that have arisen since the prior order, which were unknown at the time of the prior order, a material change has occurred in the circumstances of the child(ren) or the parties; and
2. The modification is necessary to serve the best interests of the child(ren).

Time limitations when a final order establishing primary residential responsibility has been modified:

The parent requesting modification has the burden of proving the requirements are met for modifying primary residential responsibility.

In general, neither parent may request additional modifications to primary residential responsibility until two (2) years after the date the final order modifying primary residential responsibility was entered.

Exceptions to the two (2) year time limit are:

1. The parents agree in writing to modifications to primary residential responsibility;
2. Modifications to primary residential responsibility are included in the parenting plan; or
3. The court finds modification is in the best interests of the child(ren) and one (or more) of the following:
 - The persistent and willful denial or interference with parenting time;
 - The child's present environment may endanger the child's physical or emotional health or impair the child's emotional development; or
 - The primary residential responsibility for the child has changed to the other parent for longer than six months.

The court may modify a prior order concerning primary residential responsibility at any time if the court finds a stipulated (settlement) agreement by the parties to modify the order is in the best interests of the child.

The parent requesting modification to primary residential responsibility must establish a prima facie case for modification:

The parent asking for modification must establish, in writing, a prima facie case for modification of primary residential responsibility.

“Prima facie case” is not defined in the laws enacted by the North Dakota Legislature related to modifying primary residential responsibility. You will need to research court opinions to define prima facie case and interpret for your situation. (See below for researching case law.)

NORTH DAKOTA STATUTES RELATED TO MODIFYING PRIMARY RESIDENTIAL RESPONSIBILITY:

*(North Dakota statutes are found in the North Dakota Century Code (NDCC). The North Dakota Century Code contains the laws enacted by North Dakota Legislature. The NDCC is found online at <http://www.legis.nd.gov/general-information/north-dakota-century-code>. **These are not the full chapters and sections contained in the NDCC, please follow the links to view the laws in full.**)*

Chapter 14-05 Divorce <http://www.legis.nd.gov/cencode/t14c05.html>

Chapter 14-09 Parent and Child <http://www.legis.nd.gov/cencode/t14c09.html>

- See specifically, Section 14-09-06.6: Limitations on post-judgment modifications of primary residential responsibility.
- See also, Section 14-09-06.2: Best interests and welfare of child – Court considerations – Factors.

Chapter 14-14.1 Uniform Child Custody Jurisdiction and Enforcement Act
<http://www.legis.nd.gov/cencode/t14c14-1.html>

NORTH DAKOTA CASE LAW RELATED TO MODIFYING PRIMARY RESIDENTIAL RESPONSIBILITY:

(When the decision of a case is appealed from a North Dakota District Court to the North Dakota Supreme Court, the Supreme Court writes their opinion to explain how and why they interpreted the laws or rules to decide the appeal the way they did. The opinions are case law and are followed by North Dakota courts deciding later cases with similar facts and issues.)

Review the North Dakota Supreme Court opinions related to NDCC Section 14-09-06.6. The opinions include interpretations of “prima facie case,” “material change in circumstances,” and circumstances that met the requirements for modification less than two years from the final order.

One way to research case law related to NDCC Section 14-09-06.6, is to use the print version of the North Dakota Century Code to find the short summaries of case law after each Section of the Century Code. The case law summaries are located directly following the text of the Century Code Section. To view the full text of the opinion, go to www.ndcourts.gov, click on the “Opinions” link and enter the case name or case citation.

Another way to research case law related to modifying primary residential responsibility, is to search by topic at www.ndcourts.gov. Click on the “Opinions” link, the “By Topic” link, and then on the link for “Divorce/Child Cust. & Support.”

NORTH DAKOTA COURT RULES RELATED TO MODIFYING PRIMARY RESIDENTIAL RESPONSIBILITY:

*(Court rules govern how a dispute makes its way to court and how the dispute is conducted. All of the court rules are found online at <http://www.ndcourts.gov/Rules/>. **These are not the full rules contained in the North Dakota court rules, please follow the links to view the rules in full.**)*

Rule 6 of the North Dakota Rules of Civil Procedure: Computing and Extending Time; Time for Motion Papers. <http://www.ndcourts.gov/court/rules/CIVIL/rule06.htm>

Rule 3.2 of the North Dakota Rules of Court: Motions.
<http://www.ndcourts.gov/court/rules/NDROC/rule3.2.htm>

Rule 8.1 of the North Dakota Rules of Court: Family Mediation Program.
<http://www.ndcourts.gov/court/rules/NDROC/rule8.1.htm>

- See Section 8.1(c)(1) for clerk referrals in post-judgment proceedings.

LAWS CONSTANTLY CHANGE THROUGH LEGISLATION, ADMINISTRATIVE RULE AND RULINGS, AND COURT DECISIONS.

To determine how a law applies to your situation, review the applicable law or laws, administrative rules and rulings, and court decisions. Notes of court decisions related to North Dakota law can be found in the print editions of the North Dakota Century Code. Print editions of the North Dakota Century Code and North Dakota court rules are found in many North Dakota public and academic libraries.

Only a lawyer licensed to practice in North Dakota who has agreed to represent you can give you legal advice. Legal advice includes interpreting how the laws and rules apply to your situation.

LIBRARY RESOURCES: (Not all legal resources are available online.)

ODIN is a shared library database of many North Dakota academic, public, state agency, and special libraries. Search ODIN for resources that may be available in a North Dakota library near you. (<http://www.odin.nodak.edu/>)

Following are library resources that may be of interest to you:

North Dakota Century Code Annotated, Lexis Nexis, Creation Date c1959 – present.

North Dakota Court Rules Annotated, Lexis Nexis, Creation Date c1990 – present.

OTHER LEGAL RESEARCH RESOURCES:

How to Research a Legal Problem: A Guide for Non-Lawyers, American Association of Law Libraries. (www.aallnet.org)

REVIEW YOUR NORTH DAKOTA COURT ORDER:

Review your North Dakota court order that established residential responsibility and parenting time.

Your North Dakota court order may include requirements for modifying primary residential responsibility.

You court order may also require you to take certain steps, such as mediation, to resolve disputes before you ask the court to resolve the dispute.

Review your order carefully!

PROCESS FOR A MOTION FOR AN ORDER TO MODIFY PRIMARY RESIDENTIAL RESPONSIBILITY:

Modifying primary residential responsibility is a complex process. The ND Legal Self Help Center does not have forms or instructions available for making a motion to modify primary residential responsibility. It is strongly recommended that you consult an attorney.

Carefully review the “Motions” Section of the Guide to Civil Action at www.ndcourts.gov/ndlshc/. Click on the “Guide to Civil Action” link.

When asking the court for an order in an existing case, it is done in writing in the form of a motion.

The “Motions” Section provides the basic process for making a motion for an order in an existing case. The “Motions” Section also provides basic the process for answering a motion.

Important information about serving and filing motion and answer to motion documents is found in the “Motions” Section at the link above. Review the process thoroughly!

Caution! When you represent yourself, you are held to same requirements and responsibilities as a lawyer, even if you don’t understand the rules or procedures.

FORMS FOR A MOTION FOR AN ORDER TO MODIFY PRIMARY RESIDENTIAL RESPONSIBILITY:

Generally, the parent making the motion to modify primary residential responsibility must create and prepare the following motion documents:

- Notice of motion
 - A required written notice that tells all parties that a request for an order will be made to the court.
- Motion
 - A required short, written request to the Court in an existing case for an order for a specific purpose.
- Brief in support of motion
 - A required written explanation of why the court should grant your request. A brief takes the specific rules and laws that support your request and explains how they apply to the facts of your particular situation. Facts referred to in the brief should also appear in the affidavit.
 - **Important! The brief is where you, the parent making the motion, make your prima facie case for modification of primary residential responsibility.**
- Your affidavit to support the motion
 - A written statement made under oath in front of an authorized officer. Facts referred to in the brief should also appear in the affidavit. The affidavit must be signed in the presence of a notary public or clerk of court by the individual making the statement.
 - **Important! Your affidavit is also where you, the parent making the motion, make your prima facie case for modification of primary residential responsibility.**
- Other supporting documents (settlement agreements, other affidavits, exhibits, etc.)
- Proof of service of the motion documents on the other parties.

If you, the parent making the motion, do not make a prima facie case in your motion documents, the court will dismiss your motion to modify primary residential responsibility.

Generally, the parent answering the motion to modify primary residential responsibility must create and prepare the following answer to motion documents:

- Answer brief to motion
 - A required written document that takes the rules and laws that support your response to the moving party's request and explains how your version of the facts applies to the situation that led to the motion. Facts referred to in the answer brief should also appear in your affidavit in support of your answer brief.
- Your affidavit to support the answer brief
 - A written statement made under oath in front of an authorized officer. Facts referred to in your answer brief should also appear in the affidavit. The affidavit must be signed in the presence of a notary public or clerk of court by the individual making the statement.
- Other supporting documents (settlement agreements, other affidavits, exhibits, etc.)
- Proof of service of the answer to motion documents on the other parties.

General-Use forms:

Although the ND Legal Self Help Center does not have forms or instructions available to make or answer a motion to modify primary residential responsibility, the ND Legal Self Help Center has the following General-Use motion forms for making and answering a motion. You may find the General-Use forms of interest as a starting point for creating your own motion documents.

- Notice of Motion form
- Notice of Hearing on Motion form
- Motion form
- Brief in Support of Motion form
- Answer Brief to Motion form
- Affidavit form
- Caption and Signature form

The Guide to a Civil Action is available at www.ndcourts.gov/ndlshc/ by clicking on the "Guide to Civil Action" link.

You may find the forms in the Legal Services of North Dakota Family Law Manual of interest. The Legal Services of North Dakota Family Law Manual contains a variety of divorce forms that were created for lawyers to use as examples in family law cases. The Legal Services of North Dakota website is www.legalassist.org.

(References to the Legal Services of North Dakota Family Law Manual are for your convenience only. The ND Legal Self Help Center does not endorse, warrant, or accept responsibility for the

content or uses of the Family Law Manual. You must independently determine the legal sufficiency of the forms in the Family Law Manual. Use at your own risk.)

ATTORNEY RESOURCES AND LIMITED LEGAL REPRESENTATION:

You are not required to hire an attorney to access the court system. If you decide to represent yourself, you must follow all of the rules, laws and procedures that an attorney is required to follow.

Attorney Resources

If you decide to find an attorney to represent you, you may find the following options of interest. Legal Services of North Dakota is a non-profit organization, providing free legal assistance to North Dakota residents in a variety of matters based on income. Legal Services of North Dakota can also determine whether an applicant meets the income requirements for the Volunteer Lawyers program that offers low-cost legal assistance based on income. The phone number is (800) 634-5263 and the website is www.legalassist.org.

The State Bar Association provides a lawyer referral service to match paying clients in need of legal services with lawyers. The phone number is (866) 450-9579 and the website is www.sband.org.

For a list of all lawyers who are licensed to practice in North Dakota, go to the North Dakota Supreme Court website at www.ndcourts.gov/Lawyers. You can narrow your search by city by clicking on "Cities" in the blue NAVIGATION box in the upper left of the webpage.

Limited Legal Representation

Attorneys licensed to practice in North Dakota may provide Limited Legal Representation in civil actions. Limited Legal Representation (sometimes called “unbundling”) is a way an attorney can help you with part of your case while you do the rest of your case. You pay for the part of the case the attorney handled. The Limited Legal Representation agreement must be written.

For example:

- You may want an attorney to give you an expert opinion about your options, or your legal rights and responsibilities;
- You can consult with an attorney to prepare or review your paperwork, but attend hearings yourself;
- You can represent yourself through the whole case, and periodically consult with an attorney who can coach you on the law, procedures and strategy;
- You can do the preparation yourself and hire an attorney just to make the court appearance for you.